Supreme Court, U.S.
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In The

Supreme Court of the United States

ANNE LAMB and SARAH RAYMOND,

Petitioners,

vs.

STATE OF MARYLAND and JACK KONTGIAS,

Respondents.

On Petition For Writ Of Certiorari To The Maryland Court Of Special Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER PROCEDURAL DUE PROCESS MUST BE PROVIDED TO A VICTIM OF CRIME IN A STATE APPEAL WHEN THE TRIAL COURT FAILED TO PROVIDE ANY PROCESS IN THE FIRST INSTANCE.

PARTIES TO THE PROCEEDING

The parties for the proceeding are:

1. ANNE LAMB, an individual on behalf of her daughter,
2. SARAH RAYMOND, an individual,
3. STATE OF MARYLAND, a state, and
4. JACK KONTGIAS, a defendant of the state

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PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioners, Anne Lamb and Sarah Raymond, by and through their attorney, Russell P. Butler, Esq., of the Maryland Crime Victims' Resource Center, Inc., who respectfully ask this Honorable Court to grant a Writ of Certiorari. Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS ENTERED IN THE CASE

Court of Appeals of Maryland, *Lamb v. State*, 395 Md. 57 (2006) cert. denied, appears at Appendix B.

The opinion of the Court of Special Appeals of Maryland appears at Appendix A to the petition and is reported at *Lamb v. Kontgias*, 169 Md. App. 466 (2006).

BASIS FOR SUPREME COURT JURISDICTION

The date on which the highest state court denied review of the case was October 18, 2006. A copy of that order appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, 14th Amendment § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Md. Declaration of Rights, Article 47. Rights of Victim of Crime

(a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.

(b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law.

(c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.

Md. Criminal Procedure Code Ann. § 11-103. Application for leave to appeal denial of victim's rights

(a) "Violent crime" defined. –

(1) In this section, "violent crime" means:

(i) a crime of violence; or

(ii) except as provided in paragraph (2) of this subsection, a crime involving, causing, or resulting in death or serious bodily injury.

(2) "Violent crime" does not include an offense under the Maryland Vehicle Law or under Title 8, Subtitle 7 of the Natural Resources Article unless the offense is punishable by imprisonment.

(b) Right to file for leave to appeal. – Although not a party to a criminal proceeding, a victim of a violent crime for which the defendant is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to the victim by § 11-302(c), § 11-402, § 11-403, or § 11-404 of this title or § 6-112 of the Correctional Services Article.

(c) Stay of other proceedings. – The filing of an application for leave to appeal under this section does not stay other proceedings in a criminal case unless all parties consent.

(d) Victim's representative. –

(1) For purposes of this section, a victim's representative, including the victim's spouse or surviving spouse, parent or legal guardian, child, or sibling, may

represent a victim of a violent crime who dies or is disabled.

(2) If there is a dispute over who shall be the victim's representative, the court shall designate the victim's representative.

Md. Criminal Procedure Code Ann. § 11-104. Victim Notification

(a) (1) In this section the following words have the meanings indicated.

(2) "Victim" means a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act.

(3) "Victim's representative" includes a family member or guardian of a victim who is:

(i) a minor;

(ii) deceased; or

(iii) disabled.

(c) (1) Within 10 days after the filing or the unsealing of an indictment or information in circuit court, whichever is later, the prosecuting attorney shall:

(i) mail or deliver to the victim or victim's representative the pamphlet described in § 11-914(9)(ii) of this title and the notification request form described in § 11-914(10) of this title; and

(ii) certify to the clerk of the court that the prosecuting attorney has complied with this paragraph or is unable to identify the victim or victim's representative.

(3) For cases described under this subsection, the prosecuting attorney may provide a State's witness in the case with the guidelines for victims, victims' representatives, and witnesses available under §§ 11-1001 through 11-1004 of this title.

(d) (1) A victim or victim's representative may file a completed notification request form with the prosecuting attorney.

(2) The prosecuting attorney shall send a copy of the completed notification request form to the clerk of the circuit court or juvenile court.

(3) By filing a completed notification request form, a victim or victim's representative complies with Article 47 of the Maryland Declaration of Rights and each provision of the Code that requires a victim or victim's representative to request notice.

(4) To keep the address of a victim or victim's representative confidential, the victim or victim's representative shall designate in the notification request form a person who has agreed to receive notice for the victim or victim's representative.

(e) (1) The prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case, of the terms of any plea agreement, and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:

(i) prior notice is practicable; and

(ii) the victim or victim's representative has filed a notification request form under subsection (d) of this section.

(2) If the case is in a jurisdiction in which the office of the clerk of the circuit court or juvenile court has an automated filing system, the prosecuting attorney may ask the clerk to send the notice required by paragraph (1) of this subsection.

(3) As soon after a proceeding as practicable, the prosecuting attorney shall tell the victim or victim's representative of the terms of any plea agreement, judicial action, and proceeding that affects the interests of the victim or victim's representative, including a bail hearing, change in the defendant's pretrial release order, dismissal, nolle prosequi, stetting of charges, trial, disposition, and postsentencing court proceeding if:

(i) the victim or victim's representative has filed a notification request form under subsection (d) of this section and prior notice to the victim or victim's representative is not practicable; or

(ii) the victim or victim's representative is not present at the proceeding.

(4) Whether or not the victim or victim's representative has filed a notification request form under subsection (d) of this section, the prosecuting attorney may give the victim or victim's representative information about the status of the case if the victim or victim's representative asks for the information.

Md. Criminal Procedure Code Ann. § 11-403.
Right of victim or victim's representative to address court during sentencing or disposition hearing

(a) "Sentencing or disposition hearing" defined. – In this section, "sentencing or disposition hearing" means a hearing at which the imposition of a sentence, disposition in a juvenile court proceeding, or alteration of a sentence or disposition in a juvenile court proceeding is considered.

(b) In general. – In the sentencing or disposition hearing the court:

(1) if practicable, shall allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition:

(i) at the request of the prosecuting attorney; or

(ii) if the victim has filed a notification request form under § 11-104 of this title; and

(2) may allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition at the request of the victim or the victim's representative.

(c) Cross-examination of victim or victim's representative. –

(1) If the victim or the victim's representative is allowed to address the court, the defendant or child respondent may cross-examine the victim or the victim's representative.

(2) The cross-examination is limited to the factual statements made to the court.

(d) Right not to address court. –

(1) A victim or the victim's representative has the right not to address the court at the sentencing or disposition hearing.

(2) A person may not attempt to coerce a victim or the victim's representative to address the court at the sentencing or disposition hearing.

(e) Denial of rights. – A victim or victim's representative who has been denied a right provided under this section may file an application for leave to appeal in the manner provided under § 11-103 of this title.

Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 12-301.

Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 12-302(c).

(c) Criminal case. – In a criminal case, the State may appeal as provided in this subsection.

(1) The State may appeal from a final judgment granting a motion to dismiss or quashing or dismissing any indictment, information, presentment, or inquisition.

(2) The State may appeal from a final judgment if the State alleges that the trial judge:

(i) Failed to impose the sentence specifically mandated by the Code; or

(ii) Imposed or modified a sentence in violation of the Maryland Rules.

MARYLAND RULE 4-345.

(a) Illegal Sentence. The court may correct an illegal sentence at any time.

(b) Modification or Reduction – Time For. The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition (1) in the District Court, if an appeal has not been perfected, and (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (e) of this Rule. The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

(c) Notice to Victims. The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, § 11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, § 11-503 that states (1) that a motion to modify or reduce a sentence has been filed; (2) that the motion has

been denied without a hearing or the date, time, and location of the hearing; and (3) if a hearing is to be held, that each victim or victim's representative may attend and testify.

(d) Open Court Hearing. The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in section (c) of this Rule have been satisfied. If the court grants the motion, the court ordinarily shall prepare and file or dictate into the record a statement setting forth the reasons on which the ruling is based.

(e) Desertion and Non-support Cases. At any time before expiration of the sentence in a case involving desertion and non-support of spouse, children or destitute parents, the court may modify, reduce, or vacate the sentence or place the defendant on probation under the terms and conditions the court imposes.

STATEMENT OF THE CASE

Petitioners adopt the facts as set forth by the Maryland Court of Special Appeals.

"In October 2000, appellee Jack Kontgias entered a plea of guilty to child sexual abuse of appellant Sarah Raymond. The Circuit Court for Baltimore City sentenced

Kontgias to three years of incarceration, all of which was suspended in favor of three years of supervised probation. On November 13, 2000, Kontgias filed a motion to reconsider his sentence, but asked that the motion be held in abeyance "until a hearing is requested."

On September 25, 2002, Ms. Raymond and her mother, appellant Anne Lamb filed a Crime Victim Notification Request, asking to "receive notice about all of the events related to my case and the defendant . . . as required by law," so that Raymond would "have the opportunity to exercise the rights [she is] entitled to as a crime victim." On September 4, 2003, one month before his probation was due to expire, Kontgias requested a hearing on his previously filed motion to reconsider his sentence.

On February 18, 2004, the Circuit Court for Baltimore City held a hearing on Kontgias' motion. Although Raymond and Lamb had registered as crime victim and victim representative, respectively, neither received notice of this hearing date. Consequently, neither was present to address the court.

During the hearing, the State's Attorney opposed any revision, and advised the court that the victims "would strongly oppose any imposition of probation before judgment in this case." On May 25, 2004, however, the circuit court granted Kontgias' motion. The court struck the guilty finding entered on October 4, 2000, stayed entry of judgment, granted Kontgias probation before judgment, and discharged him from probation. When Raymond and Lamb learned about this order, they retained counsel and filed a Motion to Vacate Reconsideration and Request for a Hearing. They were joined by the State's Attorney in arguing that revising the judgment against Kontgias

without prior notice to Lamb and Raymond violated Maryland law, and in opposing any sentence modification.

On February 17, 2005, without a hearing, the circuit court denied both Kontgias' motion to "strike the appearances" of Lamb and Raymond and the joint motion to vacate the revised judgment. The court ruled that the motion to vacate was untimely because it was filed seven months after the sentence modification, during which time Kontgias' original "probation expired and was completed without violation on October 4, 2003[.]"

The court concluded that it no longer had jurisdiction over Kontgias, and therefore did not address the merits of the joint motion for reconsideration.

On November 23, 2004, Kontgias petitioned for expungement of his criminal record. The State and appellants oppose the petition for expungement, which has been stayed pending resolution of this appeal. Lamb and Raymond noted an appeal to the Court of Special Appeals raising two questions for review. I. Did the circuit court err in denying appellants' motion to vacate the revised judgment on the ground that it lacked jurisdiction? II. Should the revised judgment imposing probation before judgment be vacated and the matter remanded for a new sentence modification hearing, with prior notice to appellants?" *Lamb v. Kontgias*, 169 Md. App. 466 (2006), *cert. denied,* 395 Md. 57 (2006).

The Court of Special Appeals found that the Petitioners were denied their constitutional and statutory rights to notice indicating, "they will not be burdened with the payment of court costs in this appeal." *Lamb v. Kontgias*, 169 Md. App. 466, 483, n11 (2006), *cert. denied,* 395 Md. 57

(2006). As there was no notice to the Petitioners, their rights to be present and heard were also violated.

As a convicted child sex offender, Kontgias was required to register. When the circuit court granted him a probation before judgment disposition on reconsideration, the trial court struck his conviction and therefore Kontgias no longer had to register as a child sex offender.

On October 18, 2006, the Court of Appeals denied Petitioners' request for writ of *certiorari* to that Court.

ARGUMENT

I. THE FOURTEENTH AMENDMENT AFFORDS DUE PROCESS RIGHTS TO CRIME VICTIMS.

A person is an appropriate party to appeal when the person's Fourteenth Amendment right to due process has been violated by the trial court leaving her with the state appellate court as her only effective means to seek relief. *Davis v. Passman,* 442 U.S. 228, 244 (1979). The Petitioners were denied procedural due process, an error that occurred at the Maryland Court of Special Appeals, and properly preserved when the issue was raised by the filing the petition to the Maryland Court of Appeals. The narrow issue before this Court is whether the Maryland appellate courts improperly denied the Petitioners their ability to appeal based on the Fourteenth Amendment of the United State's Constitution which provides,

> **U.S. Constitution, Amendment XIV § 1,** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court has long held that there exists a right to appeal if due process was not afforded in the lower court to first consider the issue. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 80 (1930) (Regarding the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.)

At the tribunal of first instance, the Circuit Court for Baltimore City, the Circuit Court denied the Petitioners' consideration of their claim because the Circuit Court determined it had no jurisdiction to hear the Petitioners' claim. Thus, it is clear that the Circuit Court provided the Petitioners with no procedural due process as that court denied their motion for an incorrectly perceived lack of jurisdiction to consider the Petitioners' Motion to Vacate Reconsideration. On review by the Maryland Court of Special Appeals, the Maryland appellate court determined that the Circuit Court was incorrect in its determination that it did not have jurisdiction to hear the Petitioners' claim. *Lamb v. Kontgias*, 169 Md. App. 466, 472 (2006), *cert. denied,* 395 Md. 57 (2006). (Holding that the circuit court had jurisdiction to decide whether Petitioners had standing to challenge the revised judgment.) Notwithstanding that the Circuit Court was wrong as a matter of law in not hearing the Petitioners' motion, the Court of

Special Appeals determined that the Petitioner had no standing to appeal.

> Kontgias counters that the legality of his sentence is not the dispositive issue in this appeal. Instead, he argues, even if we assume arguendo that the revised sentence is illegal or irregular due to lack of notice to appellants, nevertheless these aggrieved crime victims do not have standing to appeal because they are not parties to his criminal case and cannot obtain relief from his enrolled sentence. Kontgias contends that the General Assembly and the Court of Appeals have resolved this standing issue against crime victims. We cannot disagree. *Id.* at 475.

The people of the State of Maryland have granted victims of crime legal interests through the adoption of Article 47 of the Declaration of Rights to the Maryland Constitution which provides,

> **Md. Declaration of Rights, Article 47.**
> **Rights of Victim of Crime**
>
> (a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.
>
> (b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law.

> (c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.

The Maryland legislature has further provided these interests of crime victims include the "terms of any plea agreement, judicial action, and proceeding that affects the interests of the victim or victim's representative, including a bail hearing, change in the defendant's pretrial release order, dismissal, nolle prosequi, stetting of charges, trial, disposition, and postsentencing court proceeding." Md. CRIMINAL PROCEDURE Code Ann. § 11-104(e)(3). A reconsideration of sentence to grant a probation before judgment disposition to strike the defendant's guilty finding affects the victim's interest. Having created these legal interests for victims, the State cannot deprive victims of the benefits of these interests without due process of law.

II. MARYLAND LAW PROVIDES VICTIMS A RIGHT TO DUE PROCESS.

Petitioners are interested participants who have been provided statutory and constitutional legal interests under Maryland law. Under the Maryland Constitution, victims have a right to be "treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process." These rights are liberty interests created under Maryland law. The liberty protected by the Fourteenth Amendment is something more than exemption from physical restraint, and includes liberty of the mind as well as liberty of action. *Palko v. Connecticut,* 302 U.S. 319 (1937). Under the due process clause of the

Federal Constitution's Fourteenth Amendment, a liberty interest may arise from an expectation or interest created by state law or policies. *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005). Dignity, respect, and sensitivity are part of ordered liberty as defined by Maryland state constitution and law and as ordered liberties, they are enforceable against the states through the due process clause of the Fourteenth Amendment. *Wolf v. Colorado,* 338 U.S. 25, 27 (1949).

Even though victims have constitutional and statutory rights, the Maryland Courts have not entertained the argument that the appellate holdings in previous victim rights cases that upon failure to uphold victims' rights, there must be due process to crime victims. In this case below, the Maryland Court of Special Appeals determined that the Maryland Court of Appeals holdings in *Cianos v. State*, 338 Md. 406 (1995)[1] and *Lopez-Sanchez v. State*, 388 Md. 214 (2005), *cert. denied,* 126 S. Ct. 1042 (2006)[2] "inexorably compel us to conclude that appellants Raymond and Lamb also lack standing to appeal Kontgias' reduced sentence. Given the substantively identical law

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[1] *Cianos* was a case determined by the trial court prior to the enactment of Article 47 of the Declaration of Rights but determined by the Court of Appeals subsequent to the enactment of Article 47. The Court of Appeals determined that a victim could not appeal from a sentence which denied or failed to consider a victim's right. Cf. *Kenna v. United States Dist. Court*, 435 F.3d 1011 (9th Cir. 2006) *Kenna* provided that under federal law, a sentence without appropriate consideration of the victim could be remanded for a new sentence. The Kenna Court further commented that crime victims were no longer just supposed to act like good Victorian children – seen but not heard. *Id.* at 1013.

[2] *Lopez-Sanchez* was a case where the Court of Appeals determined that a victim of a delinquent act could not appeal when the trial court failed to consider the victims' right to restitution.

and analogous circumstances, we must follow these decisions." *Lamb v. Kontgias*, 169 Md. App. 466, 479 (2006), *cert. denied,* 395 Md. 57 (2006). Referring to a concurring opinion in *Lopez-Sanchez*, the Court of Special Appeals indicated that the opinion *in Lopez-Sanchez* "eloquently described the appellate dilemma inherent in this situation",

> In a concurring opinion joined by Judge Wilner, Judge Harrell detailed the "deeply prejudicial error" committed by the juvenile court, which prevented the victim from presenting evidence as to why the restitution order should include certain medical expenses. See id. at 231-32, 251. In Judge Harrell's view, "the Circuit Court . . . was in clear error in signing the consent order ex parte, without notice to the victim, who had properly requested such notice, and then in denying his motion for reconsideration on the ground that he did not have standing to make the motion." Id. at 231-32. Rhetorically questioning why, "as a matter of rationally considered public policy, the General Assembly has . . . made those hard-won rights largely illusory[,]" he concluded "with great reluctance" that, [a]lthough disciplinary proceedings conceivably may be brought against a judge who wilfully violates clear statutory rights, there seems to be no efficient remedy for a victim, like Mr. Lopez-Sanchez, if a judge, whether in good or bad faith, denies the victim the rights the Legislature has conferred. *Lamb v. Kontgias*, 169 Md. App. 466, 479 (2006), *cert. denied* 395 Md. 57 (2006).

Maryland's judicial interpretation resulting in the lack of victim standing to appeal creates both equal protection and due process violations under the federal constitution.

If a State has created appellate courts, the procedures used for appeals must comport with the demands of the Due Process and Equal Protection Clauses of the United States Constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Even in a civil context, when an appeal is afforded, however, it cannot be granted to some and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). In this case, Maryland's appellate procedures allow for defendants and the State to appeal and both have remedies if the trial court fails to follow the rules of court. Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 12-301 and § 12-302(c).[3]

III. A VICTIMS' RIGHT TO DUE PROCESS IS VIOLATED WHEN THEIR OPPORTUNITY TO ENFORCE A STATE RIGHT IS DENIED.

The trial court had jurisdiction to hear the victims, but it failed to adjudicate the victims' claim or even provide the victims with a hearing. Subsequently, the Maryland Court of Special Appeals of Maryland had a federal constitutional duty to consider the victim's claim, but it too failed to determine that claim. Regarding the Due Process Clause of the Fourteenth Amendment of the United States Constitution, since Maryland denied the Petitioners' procedural due process at the tribunal of first instance, a right of appeal must exist or there is a due process violation with the failure to allow an appeal. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 80

[3] Victims likewise should have the ability to appeal with remedies for a violation of their rights.

(1930).[4] Maryland's failure to consider the Petitioners' due process and equal protection claims under the 14th Amendment violates the dictates of justice. Maryland's fundamental law, its constitution, provides that victim's interests are ordered liberty through Article 47 of the Declaration of Rights.

Despite their legal interests, the Petitioners' interests have be ignored by trial courts and then by appellate courts under the interpretation by the Maryland judiciary. Contrary to Maryland Courts, federal due process require a right to appeal.[5] This Court should grant *certiorari* in this case to determine whether process is due the Petitioners.

IV. VICTIMS HAVE A LIBERTY INTEREST IN HAVING THEIR RIGHTS UPHELD BY THE JUDICIAL SYSTEM.

Petitioners are interested participants who have been provided statutory and constitutional liberty interests under Maryland law. They have a substantive interest in

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[4] Maryland, under federal constitutional jurisprudence, cannot deprive Petitioners of access to the judiciary regarding their rights. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) The right of access to the courts is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of their federal constitutional rights.

[5] Despite the lack of federal statutory authority to appeal, a victim was found to have the right to appeal when a trial court violated a victim's right to due process. *United States v. Perry*, 360 F.3d 519, 526 (6th Cir. 2004) (Indicating, regarding restitution, that "interpreting the MVRA as never authorizing non-party appeals would create potentially significant due process problems); *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (Indicating that a victim must have a right to appeal decisions contrary to their privacy rights).

this case and their claim. Their substantive interest stems from the liberty interest found in the Maryland Constitution Art. 47(a) and as further statutes adopted under state law.

In *Marbury v. Madison,* 5 U.S. 137 (1803), this Court stated:

> [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

There should and must be remedy for the denial of the Petitioners' state constitutional and statutory rights which occurred in this case. Due process under the 14th Amendment demands no less than a remedy in this case. What happened to the Petitioners is contrary to the notion of justice in our country.

> It is a prime tenet of our American political philosophy that government has a responsibility to protect the lives, liberties, and property of its citizens, and part of that responsibility includes the provision of courts where individual citizens can seek the vindication of their rights. Morrison has the right to go to court to recover his property; it is not a privilege that can be granted or denied him at the government's whim. It is this right to vindicate one's rights in court that is the heart of the constitutional right to due process of law. This principle is expressed in one of the

> original sources of the theory of constitutionalism, the Magna Carta. Section 40 of that document states that among the duties government owes to its subjects is that "To no one will we sell, to no one will we refuse or delay, right or justice." This principle is also expressed in the Supreme Court's holding that the due process clause of the fourteenth amendment prevents states from "denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), quoting *Boddie v. Connecticut*, 401 U.S. 371, 380, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). *Morrison v. Lipscomb*, 877 F.2d 463, 468 (6th Cir. 1989).

This Court in the interest of justice should prevent a failure of justice by granting this writ in order to consider rectifying the miscarriage of justice which occurred in this case. The Maryland Courts should not be able to deny crime victims the rule of law. In the administration of criminal justice, this Courts has held that courts may not ignore the concerns of victims. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). Concerns of victims have been translated into legal interests and rights by constitutional and statutory enactments. President Reagan's Task Force on Victims of Crime called for appropriate action in its final report in December 1982 including the following in a letter to President Reagan,

> We found that the perception you [President Reagan] shared when you gave us our charge is, unfortunately, true. The innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds –

> personal, emotional, and financial – have gone unattended.
>
> We also found that there is not quick remedy to the innocent victim's plight. Only sustained efforts of federal, state, and local governments, combined with the resources of the private sector, can restore balance to the criminal justice system.
>
> Citizens from all over the nation told us again and again how heartened they were that this Administration has taken up the challenge, ignored by others in the past, of stopping the mistreatment and neglect of the innocent by those who take liberty for license and by the system of justice itself.

Jurisdictions across the United States responded to the call of the Reagan Task Force, only to have courts like the Maryland court below indicate that the hard-won rights were illusory. What the Maryland courts have ignored is that victims, like all Americans, are entitled to due process protections regarding their interests.

In a different context, Justice Scalia appropriately noted the concern over the failure of courts of justice to take into account the interests of victims,

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights" – a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses

> comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced – which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty. *Booth v. Maryland*, 482 U.S. 496, 520 (1987). (Justice Scalia Dissenting)

This Court should not be one of those courts which ignore the interests of victims. In the 25 years subsequent to the Reagan Task Force, victims still have their liberty taken from them by the system. While President Truman indicated that "The buck stops here" for his executive branch responsibility, this Court should not "pass the buck" for this Court since at least 1803 has accepted responsibility for the American concept of liberty and justice through the rule of law.[6]

The lack of due process for crime victims is not a rare or remote event. In a 2004 letter from National Association of Attorneys General to Senators Kyl and Feinstein, attorneys general from across the country plainly indicated that the system unfairly treats victims denying victims the basic liberties under law,

> As Attorneys General from diverse regions and populations in our nation, we continue to see a common denominator in the treatment of crime victims throughout the country. Despite the best intentions of our laws, too often crime victims are

[6] The saying "the buck stops here" derives from the slang expression "pass the buck" which means passing the responsibility on to someone else. *See* http://www.trumanlibrary.org/buckstop.htm.

> still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. *See* http://www.nvcap.org/AG%20Letter.pdf

Crime victims like all Americans deserve the rule of law.

The Maryland courts' failure to assure a victim's right to be informed, present, and heard, while striking the defendant's conviction, and eliminating a defendant's requirements to register as a child sexual offender is extremely "one-sided" and "unjust", denying proper process to the victim and failing to uphold the law. This Court should agree to hear this case to provide that "liberty and justice to all" includes liberty and justice to victims of crime.

PETITIONERS' CONCLUSION

WHEREFORE, Sarah Raymond, Victim, and Anne Lamb, Victim's Representative, respectfully request that the Petition for Writ of Certiorari be granted as they present important issues to the Court, resolution of which would be in the public interest.

Respectfully submitted,

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0583

September Term, 2005

ANNE LAMB, ET AL.

v.

JACK KONTGIAS AND STATE OF MARYLAND

Davis,
Salmon,
Adkins,

JJ.

Opinion by Adkins, J.

Filed: July 3, 2006

Does a registered victim of child sexual abuse, who, in error, was not notified of a hearing to reconsider her assailant's sentence, have standing to challenge a judgment vacating the original conviction and sentence in favor of probation before judgment? Following *Cianos v. State,* 338 Md. 406 (1995), and *Lopez-Sanchez v. State,* 388 Md. 214 (2006), we regrettably answer "no."

FACTS AND LEGAL PROCEEDINGS

In October 2000, appellee Jack Kontgias entered an *Alford*[1] plea of guilty to child sexual abuse of appellant Sarah Raymond. The Circuit Court for Baltimore City sentenced Kontgias to three years of incarceration, all of which was suspended in favor of three years of supervised probation. On November 13, 2000, Kontgias filed a motion to reconsider his sentence, but asked that the motion be held in abeyance "until a hearing is requested."

On September 25, 2002, Ms. Raymond and her mother, appellant Anne Lamb, filed a Crime Victim Notification Request, asking to "receive notice about all of the events related to my case and the defendant . . . as required by law," so that Raymond would "have the opportunity to exercise the rights [she is] entitled to as a crime victim." On September 4, 2003, one month before his probation was due to expire, Kontgias requested a hearing on his previously filed motion to reconsider his sentence.

On February 18, 2004, the Circuit Court for Baltimore City held a hearing on Kontgias' motion. Although Raymond and Lamb had registered as crime victim and victim representative, respectively, neither received notice of this hearing date. Consequently, neither was present to address the court.

During the hearing, the State's Attorney opposed any revision, and advised the court that the victims "would strongly oppose any imposition of probation before judgment in this case." On May 25, 2004, however, the circuit court granted Kontgias' motion. The court struck the

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[1] *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

guilty finding entered on October 4, 2000, stayed entry of judgment, granted Kontgias probation before judgment, and discharged him from probation.

When Raymond and Lamb learned about this order, they retained counsel[2] and filed a Motion to Vacate Reconsideration and Request for a Hearing. They were joined by the State's Attorney in arguing that revising the judgment against Kontgias without prior notice to Lamb and Raymond violated Maryland law, and in opposing any sentence modification.

Kontgias opposed the motion, arguing *inter alia* that "the State was a party to the error it now complains of," that vacating the revised judgment effectively "would shift the notice requirement to the defendant," and that "[r]eimposing the conviction" would violate his "right not to be placed twice in jeopardy for the same offense." He also moved to "strike the appearance" of Lamb and Raymond on the ground that they were not "parties authorized by law."

On February 17, 2005, without a hearing, the circuit court denied both Kontgias' motion to "strike the appearances" of Lamb and Raymond and the joint motion to vacate the revised judgment. The court ruled that the motion to vacate was untimely because it was filed seven months after the sentence modification, during which time Kontgias' original "probation expired and was completed

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[2] Appellants are represented by the Maryland Crime Victim's Resource Center, Inc.

without violation on October 4, 2003[.][3] The court concluded that it no longer had jurisdiction over Kontgias, and therefore did not address the merits of the joint motion for reconsideration.

Lamb and Raymond noted this appeal,[4] raising two questions for our review:

> I. Did the circuit court err in denying appellants' motion to vacate the revised judgment on the ground that it lacked jurisdiction?
>
> II. Should the revised judgment imposing probation before judgment be vacated and the matter remanded for a new sentence modification hearing, with prior notice to appellants?

DISCUSSION

Crime Victim Notification

Article 47 of the Maryland Declaration of Rights guarantees a victim of crime the right, "upon request, and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented . . . by law."[5] By filing a crime victim notification request

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[3] On November 23, 2004, Kontgias petitioned for expungement of his criminal record. The State and appellants oppose the petition for expungement, which has been stayed pending resolution of this appeal.

[4] The State did not appeal the May 25 revised judgment.

[5] Article 47 provides in full:

> (a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.

(Continued on following page)

form, victims and their representatives can acquire the "right to attend any proceeding in which the right to appear has been granted to a defendant." Md. Code (2001), § 11-102(a) of the Criminal Procedure Article (CP).

It is the responsibility of the State's Attorney to provide a victim or victim's representative prior notice of a sentencing modification hearing. Section 11-104, in the Victims and Witnesses Title of the Criminal Procedure Article, provides in pertinent part:

> (e)(1) **The prosecuting attorney shall send a victim or victim's representative prior notice of each court proceeding in the case** . . . and of the right of the victim or victim's representative to submit a victim impact statement to the court under § 11-402 of this title if:
>
> (i) prior notice is practicable; and
>
> (ii) the victim or victim's representative has filed a notification request form under subsection (d) of this section.

(b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, **upon request and if practicable, to be notified of,** to attend, and to be heard at a criminal justice proceeding, **as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law**.

(c) **Nothing in this Article** permits any civil cause of action for monetary damages for violation of any of its provisions or **authorizes a victim of crime to take any action to stay a criminal justice proceeding**. (Emphasis added.)

See also Md. Rule 4-345(e)(2) ("the State's Attorney shall give notice to each victim . . . that a motion to modify or reduce a sentence has been filed [and of the] . . . the date, time, and location of the hearing").

The sentencing court also bears responsibility for ensuring that the requisite notice has been given:

> (f) *Open Court Hearing.* The court may modify, reduce, correct, or vacate a sentence only on the record in open court, after hearing from the defendant, the State, and from each victim or victim's representative who requests an opportunity to be heard. . . . **No hearing shall be held on a motion to modify or reduce the sentence until the court determines that the notice requirements in subsection (e)(2) of this Rule have been satisfied.** . . .

Md. Rule 4-345(f) (emphasis added).

These procedural rights are designed to protect the substantive right of victims and their representatives to address the sentencing court. *See* CP § 11-403(b). "A victim or victim's representative who has been denied a right provided under this section may file an application for leave to appeal in the manner provided under § 11-103" of the Victims and Witnesses Title. *See* CP § 11-403(e).

CP section 11-103, governing "application for leave to appeal denial of victim's rights," creates an appellate remedy only for victims of violent crime[6] when a sentence has been rendered in violation of their statutory rights:

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[6] Raymond qualifies as the victim of a violent crime. *See* Md. Code (2001), § 11-103(a) of the Criminal Procedure Article (CP).

> (b) *Right to file for leave to appeal.* – **Although not a party to a criminal proceeding,** a victim of a violent crime for which the defendant is charged may file an application for leave to appeal to the Court of Special Appeals **from an interlocutory or final order that denies or fails to consider a right secured to the victim by** . . . § 11-403. . . .
>
> (c) *Stay of other proceedings.* – **The filing of an application for leave to appeal under this section does not stay other proceedings in a criminal case unless all parties consent.** (Emphasis added.)

Appellants Sarah Raymond and Anne Lamb registered as crime victims. But, they allege, neither the State's Attorney nor the circuit court complied with their respective obligations to ensure that appellants received notice of the hearing to reconsider Kontgias' sentence.

I.

Jurisdiction

There is no appellate precedent answering the question now before us – whether, when neither the State's Attorney nor the circuit court fulfills the notification duties prescribed by law, a crime victim may challenge a judgment reducing her assailant's sentence on the ground that it was improperly granted. The circuit court concluded that it lost jurisdiction to consider this issue on a motion for reconsideration, because Kontgias' probation expired on October 4, 2003, seven months before the revised judgment vacating Kontgias' conviction, staying entry of judgment, and granting probation before judgment.

We hold that the circuit court had jurisdiction to decide whether appellants had standing to challenge the revised judgment. The revised judgment of May 25 vacated the original conviction and sentence in favor of probation before judgment. Both appellants and the State challenged the revised judgment in their joint motion for reconsideration. As long as the revised judgment remains in effect, appellants have a cognizable complaint that it was entered in violation of their right to prior notice of the sentence modification hearing. "Standing is concerned with whether the parties have the right to bring suit. Subject matter jurisdiction is concerned with whether the court has the power to hear a case." *Md. Waste Coalition, Inc. v. Md. Dep't of Environment*, 84 Md. App. 544, 548 (1990), *rev'd on other grounds*, 327 Md. 596 (1992). Whether appellants had standing to challenge the revised judgment on a motion for reconsideration is a separate issue from whether the circuit court had jurisdiction to hear that challenge. *See, e.g., Collins v. Cambridge Md. Hospital, Inc.*, 158 Md. 112 (1930) (orphan's court has jurisdiction to determine whether persons challenging a will had standing to caveat). The circuit court erred in ruling that it lacked authority to determine whether appellants and the State could challenge the revised judgment via a motion for reconsideration.

II.

Standing To Appeal

Md. Rule 4-345 governs a sentencing court's power to revise an enrolled sentence in a criminal case. It provides:

> (a) *Illegal Sentence.* The court may correct an illegal sentence at any time.

> (b) *Fraud, Mistake, or Irregularity.* The court has revisory power over a sentence in case of fraud, mistake, or irregularity. . . .

Lamb and Raymond renew their argument that the circuit court's failure to inquire whether notice of the sentence modification hearing had been given makes the revised sentence illegal, and therefore correctable "at any time." *See* Md. Rule 4-345(a). In their view, the rule "creates mandatory, nondiscretionary, conditions precedent to a reconsideration hearing." Alternatively, they posit, the failure of the State's Attorney and the sentencing court to follow the mandate of Rule 4-345(e) and (f) constitutes an irregularity within the meaning of Rule 4-345(b), affording the court grounds to vacate the revised judgment.

Appellants cite two cases for the proposition that the failure to notify them of the sentence modification hearing makes Kontgias' sentence illegal. In *Mateen v. Saar,* 376 Md. 385, 398-99 (2003), the Court of Appeals held that Mateen's sentence was illegally modified without notice or a hearing on the record in open court. The improper procedure used to revise Mateen's sentence resulted in a commitment order and a sentence change report that were "of no legal force or effect." *Id.* at 399; *see Scott v. State,* 379 Md. 170, 190 (2004). Appellants also rely on our decision in *Wilkins v. State,* 162 Md. App. 512 (2005), *rev'd,* ___ Md. ___, No. 65, Sept. Term 2005, 2006 WL 1563927 (filed June 9, 2006), arguing that a sentence that should never have been entered qualifies as an illegal sentence, and therefore is correctable under Rule 4-345(a).

In support of a resentencing remedy for violations of Rule 4-345, appellants rely on *Kent v. State,* 287 Md. 389, 395-96 (1980), in which the Court of Appeals held resentencing was the appropriate remedy for a sentencing

court's violation of the allocution rule permitting a defendant to present evidence in mitigation of punishment. In addition, they point to a Rules Committee note regarding a proposed change in Rule 4-345, as proof that the Court of Appeals intends its notice procedure to be strictly followed.[7]

Kontgias counters that the legality of his sentence is not the dispositive issue in this appeal. Instead, he argues, even if we assume *arguendo* that the revised sentence is illegal or irregular due to lack of notice to appellants, nevertheless these aggrieved crime victims do not have standing to appeal because they are not parties to his criminal case and cannot obtain relief from his enrolled sentence. Kontgias contends that the General Assembly and the Court of Appeals have resolved this standing issue against crime victims. We cannot disagree.

The dispositive distinction between this case, *Mateen, Wilkins*, and *Kent* is that this appeal was not taken by a defendant challenging his sentence based on alleged violations of his rights. Like Kontgias, defendants Mateen, Scott, and Kent indisputably had standing to challenge ***their own sentences*** on the ground that their rights ***as defendants*** were violated. None of these three cases, however, addresses whether a crime victim has standing to appeal a sentence allegedly entered in violation of her

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[7] The Rules Committee note to Md. Rule 4-345(f) states:

> As proposed, the Rule would prohibit a judge from deciding the merits of a motion to revise a sentence unless and until the judge is satisfied that the requirements of notice to victims have been complied with or that all reasonable means have been taken to satisfy the requirements.

constitutional and statutory rights, but not the defendant's.

The Court of Appeals has considered that question. In *Cianos v. State*, 338 Md. 406 (1995), family members of victims killed in an automobile accident caused by the defendant's criminal negligence were denied the opportunity to testify at the original sentencing hearing, allegedly in violation of their rights under former Md. Code (1973, 1989 Repl. Vol., 1994 Cum. Supp.), section 12-303.1(c) of the Courts and Judicial Proceedings Article (CJP), which is the predecessor to current CP section 11-104(b).[8] This Court denied the crime victims leave to appeal.

The Court of Appeals affirmed our decision. *See id.* at 412. It held that, although the crime victims may have been "denied their right to address the sentencing court," they had no standing to appeal the resulting sentence, because they were not parties to the criminal case. *See id.* at 410. Writing for the Court, Judge Karwacki explained:

> The only order in this criminal case was the final judgment of conviction and sentence of [the defendant]. Under Md. Code (1973, 1989 Repl. Vol. 1994 Cum. Supp.), §§ 12-301 and 12-302 of

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[8] Former Md. Code (1973, 1989 Repl. Vol., 1994 Cum. Supp.), section 12-303.1 of the Courts and Judicial Proceedings Article (CJP), provided:

> Although not a party to a criminal proceeding, the victim of the violent crime for which the defendant is charged has a right to file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to that victim by Article 27 provisions governing victim impact statements.

See Cianos v. State, 338 Md. 406, 410 (1995).

> the Courts and Judicial Proceedings Article, **only a party may appeal from a final judgment. . . . § 12-303.1 of the Courts and Judicial Proceedings Article expressly acknowledges that a victim is not a party in a criminal proceeding. The petitioner-victims, therefore, cannot appeal the only judgment in this case.**
>
> Furthermore, even if the [crime victims] had applied for leave to appeal prior to the final judgment in this case, such action would not have stayed the criminal proceedings against [the defendant]. **An appeal by a victim is collateral to and may not interrupt a criminal case, and such an appeal cannot result in a reversal of the judgment and a reopening of the case.**
>
> The petitioners do not argue that the language of § 12-303.1 is ambiguous; however, they assert that the absence of a provision expressly precluding a victim from challenging a final criminal judgment implies the right to do so. This reasoning ignores the plain language of §§ 12-301, 12-302, and 12-303.1.

Id. at 410-11 (citations and footnotes omitted; emphasis added).

In construing CJP section 12-303.1, the Court of Appeals emphasized "the legislative history of earlier, unsuccessful attempts by certain members of the Legislature to provide victims of violent crime with an avenue of redress[.]" *Id.* at 411.

> "Provisions invalidating the sentence clearly worried the legislators. A memorandum, evidently prepared by staff of the House Judiciary

> Committee, stated, '[t]he major practical problem of both bills . . . is the possibility of placing the defendant in jeopardy a second time during the sentencing hearing.' . . . The memorandum concluded that, 'House Bill 70 would be acceptable, however, if [the] lines [invalidating the sentence] were deleted. **The statute would have no teeth after such a deletion but it would provide the personal input toward which the statute is aimed.**'"

Id. (quoting *Lodowski v. State,* 302 Md. 691, 747 (1985), *cert. denied,* 475 U.S. 1086, 106 S. Ct. 1469 (1986)) (emphasis added). The *Cianos* Court concluded that these failed efforts "demonstrate[] that the Legislature, in enacting § 12-303.1," intended that crime victims would not be able to invalidate sentences on the ground that their right to participate in criminal proceedings had been denied. *See id.* at 411-12.

Relying on its rationale in *Cianos,* the Court of Appeals recently affirmed that crime victims lack standing to appeal from a criminal judgment. In *Lopez-Sanchez v. State,* 388 Md. 214 (2005), *cert. denied,* 126 S. Ct. 1042 (2006), the issue was whether a restitution order in a juvenile delinquency case could be challenged by the permanently paralyzed shooting victim. Although the juvenile court signed the restitution order *ex parte* and without a hearing or notice to the victim, the Court of Appeals concluded that the victim did not have standing to challenge that order. *See id.* at 230. The Court followed the same reasoning it previously articulated in *Cianos*:

> **A victim is not a party to a criminal prosecution.** *See Cianos v. State,* 338 Md. 406, 410-11 (1995). The non-party status of crime victims has been a central precept of Maryland

> criminal jurisprudence ever since public prosecution became the sole method of enforcing this State's criminal law. . . .
>
> The State, in a delinquency proceeding, just as **the State, in a criminal proceeding, is the party in the proceeding, represented by the State's Attorney. The victim is not a party to the proceedings and acts only as a witness, although vested with statutory and constitutional rights. . . . Because the victim is not a "party," he or she does not enjoy the general right of appeal** found at § 12-301 of the Courts and Judicial Proceedings Article.

Id. at 224-26 (citations omitted and emphasis added).

The *Lopez-Sanchez* Court acknowledged the frustration of crime victims whose rights to notice and to speak have been violated, but explained why they have no effective remedy.

> Victims' rights have received considerable attention in recent years, and rightfully so. On both the federal and state levels, legislatures have expressed the strong public policy that victims should have more rights and should be informed of the proceedings, that they should be treated fairly, and in certain cases, that they should be heard. These rights, provided by the Maryland Legislature and the Maryland Constitution, are to be followed and respected. **If, however, the prosecutor or the trial court does not follow the law with respect to a victim's rights in a juvenile proceeding, the Legislature has not given to the victim the general right to appeal that decision.**

> In the instant case, the victim is not a party to the delinquency proceeding and therefore cannot appeal. The General Assembly considered and rejected legislation that would have conferred such a right on the victims of delinquent acts. Any right of the victim to appeal, or to file an application for leave to appeal, must originate from the General Assembly, not from this Court.

Id. at 230 (citations omitted and emphasis added).

In a concurring opinion joined by Judge Wilner, Judge Harrell detailed the "deeply prejudicial error" committed by the juvenile court, which prevented the victim from presenting evidence as to why the restitution order should include certain medical expenses. *See id.* at 231-32, 251. In Judge Harrell's view, "the Circuit Court . . . was in clear error in signing the consent order *ex parte,* without notice to the victim, who had properly requested such notice, and then in denying his motion for reconsideration on the ground that he did not have standing to make the motion." *Id.* at 231-32. Rhetorically questioning why, "as a matter of rationally considered public policy, the General Assembly has . . . made those hard-won rights largely illusory[,]" he concluded "with great reluctance" that,

> [a]lthough disciplinary proceedings conceivably may be brought against a judge who wilfully violates clear statutory rights, there seems to be no efficient remedy for a victim, like Mr. Lopez-Sanchez, if a judge, whether in good or bad faith, denies the victim the rights the Legislature has conferred.

Id. at 230-31. We think Judge Harrell eloquently described the appellate dilemma inherent in this situation.

Cianos and *Lopez-Sanchez* inexorably compel us to conclude that appellants Raymond and Lamb also lack standing to appeal Kontgias' reduced sentence. Given the substantively identical law and analogous circumstances, we must follow these decisions.

Under the current subtitle governing rights of crime victims in criminal proceedings, separate sections spell out the rights to participate in presentence investigation (CP § 11-402), sentencing or disposition hearings (CP § 11-403), and death penalty proceedings (CP § 11-404). The legislature explicitly provided that any crime victim "who has been denied a right provided under" CP section 11-403, relating to participation in sentencing, may "file an application for leave to appeal in the manner provided under § 11-103 of this title." *See* CP § 11-403(e), CP § 11-404(c). But the right of appeal created in CP section 11-103 gives victims of violent crime only the limited right to "file an application for leave to appeal[,]" while explicitly directing that they are not parties to the criminal proceeding and that "[t]he filing of an application for leave to appeal . . . does not stay other proceedings in a criminal case unless all parties consent." *See* CP § 11-103; Md. Decl. of Rights, Art. 47(c).

Current CP section 11-103 is substantively identical to its predecessor, former CJP section 12-303.1. The *Cianos* Court construed this language to mean that a criminal judgment may not be appealed by crime victims who were denied their right to speak at an original sentencing hearing. We reach the same result when the crime victim has been denied her right to notice of a sentence modification hearing.

We have searched for, but not found, a legitimate pathway to materially distinguish the *Cianos* decision on the ground that this case involves a sentence modification rather than an original sentencing. Both original sentencing and sentencing modifications are governed by CP section 11-403, which broadly defines a "sentencing hearing" as "a hearing at which the imposition of a sentence . . . or alteration of a sentence . . . is considered[.]" CP § 11-403(a). Moreover, CP section 11-403(b) establishes both the right to speak at a sentencing hearing and the right to notice of that hearing. As recognized in *Lopez-Sanchez,* the two rights are "hand in glove," in that the right to receive notice of a sentencing hearing protects the right to be heard at that hearing.

We have studied whether the Court of Appeals' reasoning in *Cianos* and *Lopez-Sanchez* rested, in part, on the constitutional prohibition against double jeopardy, which might not be applicable in the context of a re-hearing on Kontgias' motion for sentence modification, when Kontgias could never receive a sentence greater than that originally imposed. But the Court's analysis in these cases did not turn on the double jeopardy prohibition.

Although the Court recognized the potential double jeopardy prohibition, it did so only in the context of assessing why the ***General Assembly*** may have limited the appellate rights of crime victims. The Court of Appeals' decisions rest on statutory interpretation alone, not on double jeopardy:

> [The crime victims] assert that the absence of a provision expressly precluding a victim from challenging a final criminal judgment implies the right to do so. This reasoning ignores the plain language of §§ 12-301, 12-302, and 12-303.1. . . .

> [T]he Legislature, in enacting § 12-303.1, meant what it said and said what it meant.

Cianos, 338 Md. at 411.

The November 1994 addition of a "victim's bill of rights" as Article 47 of the Maryland Declaration of Rights, shortly after the sentencing hearing in *Cianos* took place, does not require a different result. As the *Lopez-Sanchez* Court acknowledged, the holding in *Cianos* stems from the absence of a statute affording crime victims the right to appeal in these circumstances. The rights enumerated in Article 47 do not include a right to appeal. *See Lopez-Sanchez,* 388 Md. at 223-24, 226; *see also Cianos,* 338 Md. at 413 (acknowledging ratification of Article 47, without suggesting that it creates standing).

In the eleven years since the *Cianos* decision, the General Assembly has not acted to give crime victims status as parties to criminal prosecutions. Its only legislative action that might "give teeth" to the right of crime victims in the appellate arena was to amend CJP section 12-302(c)(2) to grant the State the right to appeal when a trial judge imposes or modifies a sentence in violation of the Maryland Rules. *See* 2003 Md. Laws, ch. 141 (effective October 1, 2003). As a party to the criminal case, the State could thus protect a victim's right to be notified of a hearing on a defendant's motion to modify a sentence.[9] "The General Assembly is presumed to be aware of this

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[9] In this case, as we noted, the State did not appeal from the court's modification of Kontgias' sentence. We do not decide whether the failure of the State's Attorney to notify the crime victims of the sentence modification hearing would have precluded the State's appeal on the basis that the court also failed in its obligations to insure that the victim and her representative were notified.

Court's interpretation of its enactments and, if such interpretation is not legislatively overturned, to have acquiesced in that interpretation." *Williams v. State,* 292 Md. 201, 210 (1981). We assume that the General Assembly knowingly declined to trump the *Cianos* Court's interpretation of CJP section 12-302 and CP sections 11-403 and 11-404.

Finally, we are not persuaded by appellants' argument that *Cianos* is distinguishable on the ground that the sentencing court in that case had discretion to deny the victim an opportunity to testify at the sentencing hearing, whereas the sentencing court here was required to ensure the victim received notice of the modification hearing. The *Cianos* decision rests on the same assumption that we make in this case, *i.e.,* that the sentencing court violated the rights of the crime victims who, as a result, are seeking to vacate the sentence and reopen the criminal case for new sentencing proceedings. Thus, any discretion that the sentencing court may have had in *Cianos* was immaterial to the Court of Appeals' holding that those crime victims lacked standing to appeal.

We see nothing that could reconcile the holding in *Cianos* that crime victims cannot attack an original criminal sentence on the ground that they were not permitted to speak at the initial sentencing hearing, with a holding in this case that a crime victim can attack a reduced criminal sentence on the ground that she was not notified of the sentence modification hearing.[10] Regardless

[10] Our decision is consistent with case law interpreting similar statutory and constitutional rights in other jurisdictions. *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review,* 2005 B.Y.U. L. Rev. 255 (2005) ("Present victim

(Continued on following page)

of which right to participate in sentencing may have been violated, or whether the hearing involved initial sentencing or a proposed modification, "[a]n appeal by a victim is collateral to and may not . . . result in reversal of the judgment and a reopening of the case." *Cianos,* 338 Md. at 411. Although the holdings in cases such as *Cianos, Lopez-Sanchez*, and this one may appear unjust, any available remedy depends on a legislative expansion of the rights of crime victims to appeal, or the State exercising its right to appeal. *See Lopez-Sanchez,* 388 Md. at 230, 251.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.[11]

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rights' laws . . . often severely curtail standing, remedy, or review"); *Cooper v. District Court,* 133 P.3d 692, 696 (Alaska Ct. App. 2006) ("courts from other states are unanimous in holding that a crime victim does not have the right to participate as an independent party in a criminal case") (collecting cases).

[11] Because appellants were denied their constitutional and statutory rights to notice, "they will not be burdened with the payment of court costs in this appeal." *See Cianos*, 338 Md. at 413-14.

APPENDIX B

395 Md. 57, 909 A.2d 259

Lamb v. StateMd. 2006. (The decision of the Maryland Court of Appeals is referenced in the Atlantic Reporter in a table captioned "Petitions for Writ of Certiorari.")

Court of Appeals of Maryland

Anne Lamb

v.

State

No. 313 Sept. Term 2006

October 18, 2006

Reported below: 169 Md.App. 466, 901 A.2d 860.

Disposition: Denied.

395 Md. 909 A.2d 260

Lamb v. StateMd. 2006. (The decision of the Maryland Court of Appeals is referenced in the Atlantic Reporter in a table captioned "Petitions for Writ of Certiorari.")

Court of Appeals of Maryland

Sarah Raymond

v.

State

No. 313 Sept. Term 2006

October 18, 2006

Reported below: 169 Md.App. 466, 901 A.2d 860.

Disposition: Denied.